

SEP 14 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HILARIO MEZA-ESTRADA,

Defendant - Appellant.

No. 06-10011

D.C. No. CR-05-00076-LRH

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Submitted September 11, 2006**

Before: PREGERSON, T.G. NELSON, and GRABER, Circuit Judges.

Federal prisoner Hilario Meza-Estrada appeals from his conviction and 70-month sentence imposed following a guilty plea to being an illegal alien found in the United States after having been deported, in violation of 8 U.S.C. § 1326.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Meza-Estrada contends that the district court erred by increasing his sentence pursuant to 8 U.S.C. § 1326(b)(2) based on judge-found facts, when he did not admit and a jury did not find beyond a reasonable doubt the facts of his prior conviction and/or its temporal relationship to his deportation. He further contends that the constitutional avoidance doctrine requires this court to interpret 8 U.S.C. § 1326(a) in a manner that would limit his sentence to two years imprisonment. He also contends that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), does not apply here because it was based on a Fifth Amendment and not a Sixth Amendment challenge. Finally, Meza-Estrada contends that in light of subsequent Supreme Court decisions, and changes to 8 U.S.C. § 1326(b)(2), *Almendarez-Torres* is not binding precedent.

These contentions are foreclosed. *See United States v. Velasquez-Reyes*, 427 F.3d 1227, 1229 (9th Cir. 2005) (rejecting the contention that the government is required to plead prior convictions in the indictment and prove them beyond a reasonable doubt to a jury unless defendant admits the prior conviction in his guilty plea); *United States v. Weiland*, 420 F.3d 1062, 1079 n.16 (9th Cir. 2005) (noting that we continue to be bound by the Supreme Court's holding in *Almendarez-Torres*); *United States v. Castillo-Rivera*, 244 F.3d 1020, 1024-25

(9th Cir. 2001) (rejecting the contention that the fact of the temporal relationship between the deportation and the prior conviction under 8 U.S.C. § 1326(b)(2) is beyond the scope of the Supreme Court’s recidivism exception); *United States v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir. 2001) (stating that *Almendarez-Torres* is “dispositive” in rejecting Sixth Amendment claim).

Meza-Estrada next contends that the district court erred in denying his motion to withdraw his guilty plea. We disagree. The fact that Meza-Estrada received a higher sentence than he had anticipated is not a “fair and just reason” for withdrawal. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1117 (9th Cir. 2003) (en banc). Accordingly, Meza-Estrada has not met his burden of showing that the district court abused its discretion in denying his motion to withdraw his plea. *See id.*

AFFIRMED.